Filed April 24, 1901

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900.

No. 330.

CHARLES M. WHITE, JOHN C. THOMPSON and HENRY EGGERTON, Petitioners,

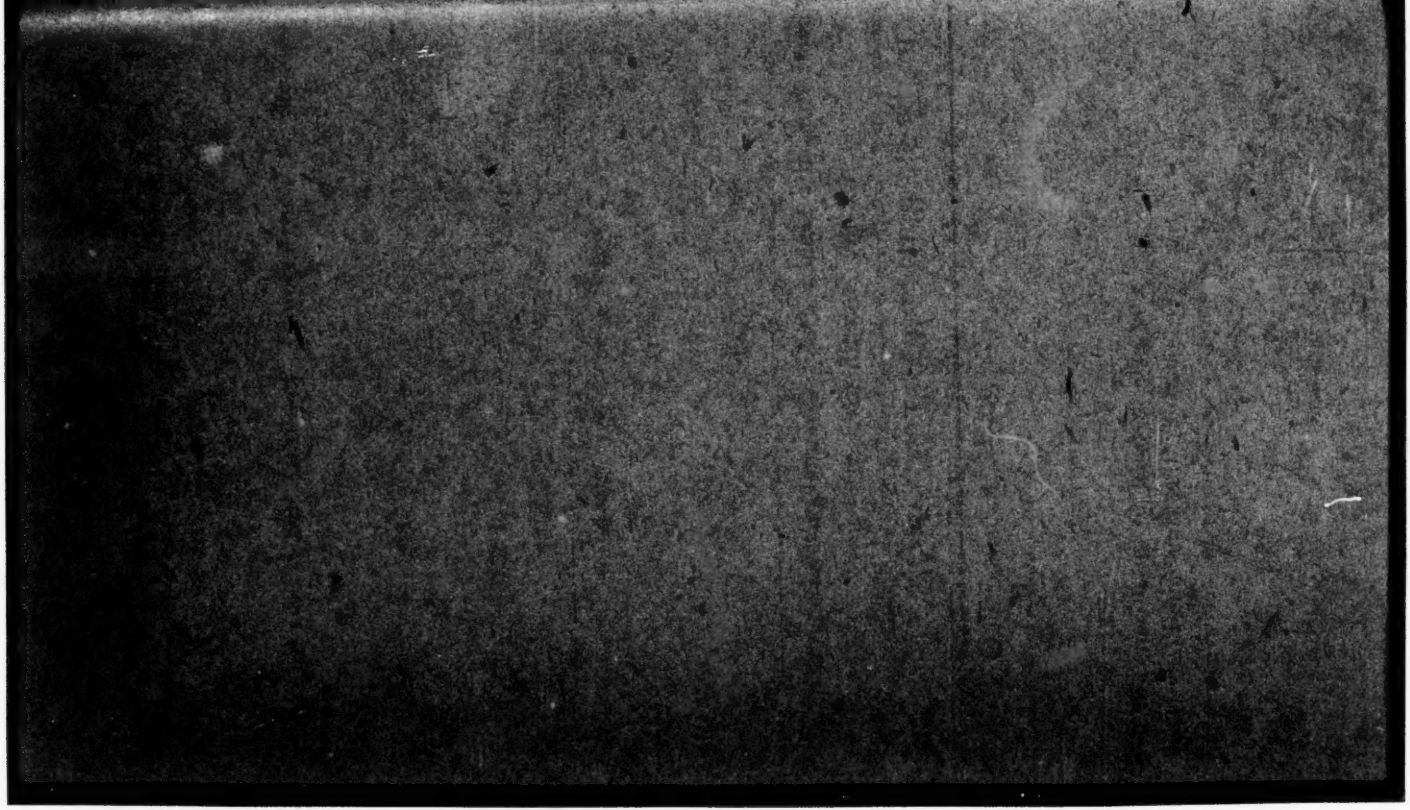
vs.

AUGUST T. SCHLOSSER, EUGENE B. SCHICKEBANTZ and HARRY ROBERTS, Trustee, Respondents.

Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF IN BEHALF OF RESPONDENTS.

(17,644)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 530.

CHARLES M. WHITE, JOHN C. THOMPSON and HENRY ECKSTEIN, Petitioners,

vs.

AUGUST T. SCHLOERB, EUGENE B. SCHICKEDANTZ and HENRY ROKNITZ, Trustee, Respondents.

Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

RESPONDENTS' BRIEF.

Questions certified to this Court:

First. Whether the District Court, sitting in bankruptcy, had jurisdiction by summary proceedings to compel the return of the property seized.

Second. Whether, after adjudication in bankruptcy, an action in a state court can be commenced and maintained against a bankrupt to recover property in the possession of and claimed by the bankrupt at the time of the adjudication.

Third. Whether the property of a bankrupt upon his adjudication in bankruptcy is in custodia legis of the bankrupt court and can be taken possession of under process of a state court.

BRIEF OF ARGUMENT.

The second and third questions certified to this Court will be first considered, as they are practically the same question. The answer of the second question would seem to be decisive of the third, which cannot be answered "yes" or "no." It will be considered under five heads.

First. Provisions of bankrupt law.

Second. General principles of jurisdiction.
Third. Decisions under former bankrupt acts.
Fourth. Decisions under present bankrupt act.
Fifth. Further aspects of the question.

I.

Bankrupt law of 1898, Section 2. The district courts of the United States in the several states * * * * * are hereby made courts of bankruptcy, and are hereby invested within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law AND IN EQUITY as will enable them to exercise original jurisdiction in bankruptcy proceedings in vacation, in chambers and during their respective terms, as they are now or may be hereafter held, to (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow them, against bankrupt estates. (3) Appoint receivers or the marshals upon application of parties in interest in case the courts shall find it absolutely necessary for the preservation of estates, to take charge of the property of the bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified. (6) Bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy. (7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided. (13) Enforce obedience by bankrupts, officers and other persons, to all lawful orders by fine, or imprisonment, or fine and imprisonment. (15) Make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act.

Section 2, last clause. Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated

By Section 7 the bankrupts are put under legal obligation to

assist the trustee in every manner to collect the assets of the estate, and see that they are properly distributed. The bankrupt is to examine all proofs of claim, execute and deliver all papers ordered by the court, and transfer all property in foreign countries, inform the trustee of any attempt of creditors to evade the act, or of any persons to prove a false claim, etc.

By Section 22a the bankruptcy court may immediately after a person has been adjudged a bankrupt, refer the cause to the referee with general powers to proceed with the administration of the estate.

By Section 29b it is provided that a person shall be punished by imprisonment upon conviction of the offense of having knowingly and fraudulently (subdivision 4) received any material amount of property from the bankrupt after the filing of the petition, with intent to defeat the act.

By Section 47 trustees are to collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest.

Section 67 provides that all liens created by or obtained in any suit or proceeding at law or in equity including an attachment upon mesne process * * * * * * which was begun within four months before the filing of the petition by or against such person, shall be dissolved by adjudication of bankruptcy. And further provides that all conveyances, transfers, or assignments of property of bankrupt within four months prior to the filing of the petition shall be void, and same be and remain a part of the assets of the estate of a bankrupt; and shall pass to the trustee, whose duty shall be to recover and reclaim the same. Furthermore the court may order persons obtaining such attachments and liens to make such conveyances as shall be necessary to carry the act into effect.

Section 70 provides that the trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or suc-

cessors, if he shall have one or more, upon his appointment and qualification, shall in turn be vested by operation of law with the title of bankrupt as of the time he was adjudged a bankrupt. This includes (5) property which, prior to the filing of the petition, he could by any means have transferred. And subdivision 25 of Section 1 of the bankrupt law declares that the word "transfer" shall include selling, conveying, or parting with property.

It will thus be seen that the most stringent and far-reaching provisions have been made for reducing the possession of the bankrupt's estate to the district court and its officers, and for the trustee's recovering possession of every species of property from anybody having the same in possession, and for the collection of assets, and for a speedy, inexpensive administration of the entire estate in the district courts of the United States, which are alone courts of bankruptcy.

II.

GENERAL PRINCIPLES OF JURISDICTION.

It will be noticed, first, that Schloerb & Schickedantz were declared bankrupts by the court many days before the action of replevin was begun in the state court. Second: that by virtue thereof the bankrupt court and its officers were in possession of the stock of goods replevined, holding the same as a part of the bankrupt estate. That is, the district court of bankruptcy acting in rem, had possession of the res. This fact brings the case directly within the well known principle of law and equity that the court which has jurisdiction of the res will retain jurisdiction thereof for all purposes and make a final adjudication among all claimants thereto. We respectfully submit that that principle is controlling in this case. Nowhere has it received a fuller and more complete exposition than in the federal decisions.

Among the first of these is the case of Hagan vs. Lucas, 10 Peters, 400. Slaves, claimed to be the property of B. and D., were levied on under an execution upon judgments of a court of the state of Alabama. After being so levied on by the state officers,

the marshal of the United States District Court also levied upon the same slaves on a judgment of the federal court, against the same persons. It was held that the levy of the marshal was void. The first levy, whether it is made under the federal or state authority, withdraws the property from the reach of the process of the other. A most injurious conflict of jurisdiction would be likely, often, to arise between the federal and the state courts, if the final process of the one could be levied on property which had been taken by the process of the other. Property once levied on remains in the custody of law and it is not liable to be taken by another execution in the hands of a different officer, and especially by an officer acting under a different jurisdiction.

It is said in Peck vs. Jenness, 7 Howard, 612, that "it is a doctrine of law, too long established to require the citation of authorities, that where a court has jurisdiction, it has a right to decide every question which occurs in the cause. And that right cannot be arrested or taken away by proceedings in another court. Neither can one take property from the custody of the other by replevin, or any other process."

In Shawham vs. Wherritt, 7 Howard, 627, a creditor, with knowledge of conduct amounting to an act of bankruptcy, attempted, by a creditor's suit in state court, to obtain a lien on the property of the bankrupt. In a suit in a district court by assignee afterwards appointed, it was held that the bankrupt law made the state proceedings void, and the court decreed that the property or its proceeds should be turned over to the assignee. See also the case of

Williams vs. Benedict, 8 Howard, 107.

In Wiswall vs. Sampson, 14 Howard, 52, it was held that where one has a judgment lien on land, in possession of a receiver, he cannot proceed to levy his execution, but must come into the court having custody of the land. His remedy is in the court of chancery, which will take care to direct a proper distribution of the funds. When a receiver has been appointed, his possession is

equal to that of the court, and any attempt to disturb it without leave of the court first obtained will be a contempt on the part of the person making it. The court quote from Daniel on Pleading and Practice in Chancery, as follows: "The proper course to be pursued by any person who claims title to an estate or other sequestered property, whether by mortgage or judgment liens or otherwise, or who has a title paramount to the sequestration, is to apply to the court to direct the plaintiff to exhibit interrogatories before one of the masters, in order that the party applying may be examined as to his title to the estate. An examination of this sort is called examination pro interesse suo; and an order for such an examination may be obtained by the party interested as well where the property consists of goods and chattels or personalty, as where it consists of real estate." And "where sequestrators are in possession under a process of the court, their possession is not to be disturbed even by an adverse title, without leave. Upon this principle that the possession of the sequestrators is the possession of the court, and the court being competent to examine the title, will not permit itself to be made a suitor in a court of law but will itself examine the title."

See Daniel's Chancery Pleading and Practice, vol. 2, 4th Ed., page 1057, 1058, 1059.

Peale vs. Phipps, 14 Howard, 369.

Taylor vs. Carryl, 20 Howard, 583, held, that where a vessel has been seized under a process of attachment in a state court, and is in the actual custody of the sheriff, no valid seizure of her can be made so as to give jurisdiction in proceedings in rem in the admiralty courts of the United States. The court says the court of chancery does not allow the possession of its receiver, sequestrator, committee, or custodee to be disturbed by a party, whether claiming by title paramount or under the right which they were appointed to protect. Hagen vs. Lucas, 10 Peters, 400, cited with approval.

See also Harris vs. Dennie, 3 Peters, 292.

In the leading case of Freeman vs. Howe, 24 Howard, 450, the marshal attached certain railroad cars in a suit against the railroad company in the United States Circuit Court, which cars were afterwards taken out of his hands by the sheriff of a state court under replevin process; the plaintiffs in the state court claiming to be the mortgagees of the property. It was held that the state process was void. Practically the same argument was made in that case as has been made by the petitioners here. "Another and main ground relied on by the defendants in error is that the process in the present instance was directed against the property of the railroad company, and conferred no authority upon the marshal to take the property of the plaintiffs in the replevin suit. But this involves a question of right and title to the property under the federal process, and which it belongs to the federal, and not the state courts, to determine."

Speaking of the case of Slocum vs. Mayberry, 2 Wheat., 2, the court quoted Chief Justice Marshal as follows: "Any interference of a state authority, which, by taking the thing seized out of the possession of the officer of the United States, might obstruct the exercise of this jurisdiction, would unquestionably be a violation of the act, and the federal court having cognizance of the seizure might enforce a re-delivery of the thing by attachment or other summary process, against the parties who should divest such a possession. The party supposing himself aggrieved by a seizure cannot, because he considers it tortious, replevy the property out of the custody of the seizing officers, or of the court having cognizance of the cause." Furthermore the court goes on to show what the proper remedy is. Page 460.

See also Buck vs. Colbath, 3 Wall., 334.

Krippendorf vs. Hyde, 110 U. S., 276.

In that case the former decisions are examined at length, and Freeman vs. Howe is given emphatic approval. The proper practice for adverse claimants to res in custodia legis is also explained.

In Covell vs. Heyman, 111 U. S., 176, the marshal having seized certain personal property under execution issued upon a judgment of the United States Circuit Court, the defendant in error brought an action of replevin in state court to recover same from the marshal. Upon writ of error to Supreme Court of Michigan, it was held that the action of replevin should be dismissed. The previous cases are examined and reaffirmed, the court saying the United States courts and state courts do not belong to the same system, so far as their jurisdiction is concurrent, and although they co-exist in the same place, they are independent and have no common superior. And when one court takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void.

Chapman vs. Brewer, 114 U. S., 158.

In Heidritter vs. Elizabeth Oil-cloth Co., 112 U. S., 294, the effort to foreclose a mechanics lien in a state court after seizure of the res by the marshal of a United States Court, was held vain, nugatory and void.

Porter vs. Sabin, 149 U. S., 473, is to the same effect. "When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate. The possession of the receiver is the possession of the court. Any claim against the receiver, the court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of; and no suit, unless expressly authorized by statute, can be brought against a receiver without the permission of the court which appointed him. Page 479.

See also In re. Chetwood, 165 U. S., 443.

Appleton Water Works Co. vs. Central Trust Co., 93 Fed. Rep., 286.

Patterson vs. Mater, 26 Fed. Rep., 31.

Shields vs. Coleman, 157 U. S., 168, where it is said that seizure is not necessary in order that the court may get jurisdiction over the res. It may be obtained by actual seizure and may be done by a mere bringing of the suit, in which the claim is sought to be enforced, and which may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purpose of the suit. This brings us to that set of cases establishing beyond doubt the principle that

ALL THE PROPERTY IN THE POSSESSION OF THE BANKRUPT AT THE TIME OF THE ADJUDICATION AND CLAIMED BY HIM TO BE HIS PROPERTY, COMES INTO THE CUSTODY OF THE BANKRUPT COURT UPON THE ADJUDICATION OF BANKRUPTCY.

A proceeding in bankruptcy is a proceeding in rem. The adjudication of bankruptcy against Schloerb & Schickedantz acted as an attachment of their estate. All property afterwards replevied by Cogan & Son was at time of bankruptcy in the lawful possession of the bankrupts, who claimed title thereto. Upon being adjudicated bankrupts, they closed and locked the store, under the direction of Charles H.Forward, referee in bankruptcy. The moment Schloerb & Schickedantz were declared bankrupts, all their stock of goods was in custodia legis of the bankrupt court.

After the case was referred to the referee it was his duty to see that the store was locked and he was bound to preserve the estate until the trustee should qualify. It was his imperative duty to do so.

Under the act of 1867, Justice Blatchford in the United States District Court for the Southern District of New York, in the case of In re. Hasbrouck, 1 N. B. R., 75, held that a register is authorized and required, upon the request of a voluntary bankrupt, to receive the surrender of all his property and safely keep it until turned over to the assignee. This ruling was approved in the cases of In re. Bogart and In re. Shafer, 2 N. B. R., 585, 586.

As is said In re. Brinkman, 7 N. B. R., 421, 428, "The com-

mencement of proceedings in bankruptcy at once transfers to the district court the jurisdiction over the bankrupt, his estate, and all parties and questions connected therewith, and operates as a supersedeas of all process in the hands of the sheriff of a state court. The filing of a petition in bankruptcy at once brings the property of the insolvent into the bankrupt court, and places it in its custody, and under its protection, as fully as if actually brought into the visible presence of the court. Being in the custody of the court, no other court can, without the permission of the court in bankruptcy, interfere with it; and to so interfere is a contempt of the bankrupt court. I have examined all the authorities I can find upon this question, and find that Judges Chase, Clifford, and Field of the Supreme Court of the United States, hold the same view of the law; and that all the district judges also decide in the same manner; and the only opinion to the contrary is the opinion In re. Campbell." In that case the mortgagee was enjoined from foreclosing in a state court a mortgage on bankrupt's property. The opinion is by a referee but it approved by Judge Blatchford, see numerous authorities cited therein.

The same doctrine is laid down by Judge Erskine in In re. Steadman, 8 N. B. R., 319, where that Judge says, "From the hour S. filed his petition in bankruptcy, he was divested of his estate, real and personal, in possession or in action, and the estate, by operation of the bankrupt law, must be considered in custodia legis as fully, indeed, as if the court had the prehensory power over it. It was the duty of the bankrupt to protect and preserve estate for the benefit of his creditors, and apply to the bankrupt court for such remedy as may avert an approaching wrong. The following are to same effect:

Phelps vs. Sellick, 8 N. B. R., 392, 394. In re. Anderson, 9 N. B. R., 360.

Federal Cases No. 351.

Hewett vs. Norton, 13 N. B. R., 279.

Byrd vs. Harrold, 18 N. B. R., 436.

Hudson vs. Schwab, 18 N. B. R., 482, et seq.

Jones vs. Leach, 1 N. B. R., 595.

In this case the court not only had constructive possession of the res of the bankrupt from the moment of the adjudication, but the court also, through its referee, and through the bankrupt himself, acting for the referee and for the court, took actual possession of the res.

Actual possession of the res, however, was not necessary in order to put the thing in custodia legis. The court which first takes jurisdiction of a controversy and the parties is entitled to retain it to its final termination; and also to take possession of the res, subject of the controversy, exclusive of all interference from any other court. And it is not essential that the court first taking jurisdiction of the controversy should also first take the actual possession of the res.

Gaylord vs. Ft. W. M. C. R. R. Co., 6 Bissell, 286.

There it was held, a creditor's bill being filed in the United States Court before a similar creditor's bill was filed in a state court, although the state court first took actual possession of the res, that the United States Court had exclusive jurisdiction thereof. Judge Drummond says that the controlling principle is this: "That the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and incidentally to take possession or control of the res. Judges Hopkins and Blodgett concurred. This is quoted with approval in High on Receivers, pages 38, 41.

A creditor's bill acts as a lis pendens and gives jurisdiction of person and subject matter.

Miller vs. Sherry, 2 Wallace, 237.

Crittenden vs. Brewster, 2 Wallace, 191.

Such a suit amounts to an equitable levy.

Central R. R. Co. vs. Peters, 113 U. S., 124.

Union Trust Co. vs. R. R. I. Co., 6 Bissell, 197.

The court first acquiring jurisdiction, its power being adequate to the administration, should retain its jurisdiction and confine the litigation to that forum.

Conover vs. Mayor, 25 Baarbour, 513.
Ex parte Bushnell, 8 Ohio St., 601.

We beg to call your Honors' attention to the case of Atlas Bank vs. Nahant Bank, 23 Pickering, 481. On July 7th, 1838, a creditor's bill was filed in one of the state courts of Massachusetts, against the Nahant Bank, praying for receivers, etc., and an injunction. On August 17th, the petitioners were appointed receivers by the court. It appeared that after the filing of the bill and issuing of the injunction, but before the actual appointment of receivers, to-wit: about the 21st of July, the respondents made their attachment of real estate of the Nahant Bank, for debts alleged by them to be due. The receivers petitioned for an order dissolving and restraining respondents from proceeding on their attachments. Granted. Opinion is by Chief Justice Shaw. We call especial attention to what that learned Judge says on page 489 in regard to the receivers thus appointed as being applicable to the office of trustees under the present bankruptcy act. And speaking of the effect of the creditor's bill he says: "And the court are of opinion that the sequestration intended to be made by force and operation of this statute for the benefit of all creditors by one general process, must be considered as taking effect not merely from the time of the appointment of receivers, which is an incidental step in the proceeding, but from the institution of the proceeding by the filing of the bill, or at least by the act of the court sustaining it, by the issuing of an injunction."

See also Bell vs. Ohio Life and Trust Co., 1 Bissell, 260, and Adams vs. the Mercantile Trust Co., 66 Fed. Rep., page 621, and the cases there cited.

Not only is the adjudication of bankruptcy a decree in rem, but, as was said by Mr. Justice Swayne in Bank vs. Sherman, 101 U. S., 403, "The filing of the petition was a caveat to all the world. It was in effect an attachment, and an injunction."

Counsel for petitioners seems to have been under the impression that the position of the trustee in bankruptcy is analogous to that of an assignee under the insolvent laws of a state; and has so claimed in former arguments of this case. This is a vital error. A trustee in bankruptcy is, (1) appointed by the court in a proceeding distinctly in rem. (2) In a proceeding under the supreme law of the land. (3) In a court by express enactment a court of equity. (4) Like a receiver in chancery, who takes by operation of law, and not through the instrumentality of a deed. White vs. Ewing, 159 U. S., 39. He is something more than a receiver in chancery. Atlas Bank vs. Nahant Bank, 23 Pickering, 489.

An assignee under insolvent laws is merely a transferee under a common law deed.

IV.

DECISIONS UNDER FORMER BANKRUPT ACTS.

In many respects the bankrupt act of 1841 closely resembles the present bankrupt act, although it contained fewer provisions for giving absolute control to the bankrupt court than are found in the present law. The question of the true nature and extent of the jurisdiction of the district court, sitting as a court of bankruptcy, was fully and ably treated and discussed by Justice Story in the case of

Ex parte Christy, 3 Howard, 308.

That case was an application to this court for a writ of prohibition to prohibit the district court of the United States for the district of Louisiana from further proceedings in a case in bankruptcy, where that court had on petition enjoined foreclosure proceedings in a state court. Justice Story held that the district court, sitting in bankruptcy, had jurisdiction over liens and mortgages, and to inquire into their validity, and to enjoin proceedings in state courts by acting upon the parties through injunction or other appropriate proceedings in equity. Mr. Justice

Story says, "The obvious design of the bankrupt act was to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period. For this purpose it was indispensable that an entire system, adequate to that end, should be provided by congress, capable of being worked out through the instrumentality of its own courts, independently of all aid and assistance from any other tribunal over which it could exercise no effectual control." And again, "It is manifest that the purpose so essential to the just operation of the bankrupt system could scarcely be accomplished except by clothing the courts of the United States, sitting in bankruptcy, with the most ample powers and jurisdiction to accomplish them. We entertain no doubt that under the provisions of the sixth section of the act, the district court does possess full jurisdiction to suspend or control such proceedings in the state courts by acting on the parties. Such a course is very familiar in courts of chancery in cases where the creditor's bill is filed for the administration of the estate of a deceased person, and it becomes necessary or proper to take the whole assets into the hands of the court for the purpose of collecting priorities, and claims, and accomplishing a due and equitable distribution among all parties in interest in the estate. On pages 319 and 320 Justice Story shows what would be the effect of a doctrine that numerous suits could be brought in different state courts, and shows that such a course might cause irreparable damage to the creditors of the bankrupt. "If we are told that resort may be had to the state courts for redress, one answer is that in some of the states no adequate jurisdiction exists in the state courts, since they are not clothed with general jurisdiction in equity; but a stronger and more conclusive answer is that congress did not intend to trust the working of the bankrupt system solely to the state courts of twenty-six states, which were independent of any control by the general government, and were under no obligations to carry the system into effect. The judicial power of the United States is by the constitution competent to all such purposes, and congress by the act intended to secure the complete administration of the whole system in its own courts,

as it constitutionally might do." The able opinion might be quoted at great length as being directly in point on this argument.

As said in Hudson vs. Schwab, 18 N. B. R., 482, speaking of the effect of the doctrine that the state courts had full jurisdiction in all such matters: "The settlement of an estate may be delayed by frivolous appeals, or by new trials, or wasted in fruitless litigation. The assignee may rely upon defenses peculiar to the bankrupt law and not available to him in the state courts. Should such defenses be improperly overruled, and it is safe to assume that such cases will occur, the assignee is remedyless except by an appeal to the supreme court of the United States, involving tedious delays and great expense."

The decisions in point under the bankrupt act of 1867 are extremely numerous. A few of these will be cited. In in re. Barrow, 1 N. B. R., 481, a petition by assignee to sell real estate free and unencumbered, Durrell, J., said, "The estate surrendered is placed in the custody of the court sitting in bankruptcy. No court of an independent state jurisdiction can withdraw the property surrendered, nor determine in any degree the manner of its disposition. The powers of the bankruptcy court extend to a suspension of proceedings taken for the purpose of subjecting portions of the estate surrendered to a sale under state process."

In in re. Vogel, 2 N. B. R., 427, (Quarto 138), the petition in voluntary bankruptcy was filed on the 5th of October, 1868. On the 6th of October the petitioner surrendered his property to the register to whom the case was referred. Thereafter, on the same day, the sheriff, under process of replevin, brought against the petitioner in the Supreme Court of the state of New York, by Thomas & Co., took from the store certain goods and merchandise of the value of several hundrd dollars, which Thomas & Co. claimed were purchased by bankrupt of them through fraud, and that no title to the goods ever passed. On October 7th, the petitioner was duly adjudged a bankrupt. On the 10th of October the said sheriff, under a process of replevin brought by K. O. & Co., who made the same claim, seized other goods. There were

several other similar suits. Assignees in bankruptcy being afterwards appointed, petitioned the bankrupt court for an order directing the parties to deliver the property to the assignees. "The only defense made to the petition on the facts is that the several plaintiffs in the replevin suits owned the property taken and that it was not the property of the bankrupt." Blatchford, Justice, held: "It is manifest from these provisions that when a voluntary petitioner in bankruptcy files his petition in due form, he becomes eo instante a bankrupt, so far as any interference with the property is concerned; and that such property is thereby brought into the bankrupt court and placed in its custody and under its protection as fully as if actually brought into the visible presence of the court. Being in the custody of the bankrupt court, no other court and no other person, acting under any process from any other court, can without permission of the bankruptcy court, interfere with it; and to so interfere is a contempt of the bankruptcy court." "The property being in the bankruptcy court in specie, that court has ample jurisdiction conferred upon it by the bankruptcy act to adjudicate in regard to it. The question before this court now is not who has the rightful title to this property, but whether the lawful possession of it by the court has been unlawfully interfered with." The goods so seized were ordered turned back into the bankruptcy court.

The case on appeal was affirmed by Judge Nelson.

In re. Vogel, 3 N. B. R., 198.

In the case of In re. People's Mail Steamship Co., 2 N. B. R., 552, it was held that after bankruptcy, even proceedings in admiralty in the United States court could not be brought against the res. "If the libellants have any lien on the vessel, the court of bankruptcy has full power to ascertain and liquidate such lien on its being presented in proper form to that court."

See also in re. Rosenberg, 3 N. B. R., 130.

Sampson vs. Burton, 6 N. B. R., 403.

In Sampson vs. Blake, 6 N. B. R., 410, the facts were sub-

stantially the same as those in the case at bar. Goods were seized under a writ of replevin and the bankruptcy court, on petition, ordered the sheriff to turn them over to the assignee. Judge Woodruff says, "The proofs, I think, warranted the conclusion of the court below, that the property in question came to the possession of the assignee as part of the estate of the bankrupt, and was in his possession when Blake took it by writ of replevin. The district court would have failed in its duty had it suffered that possession to be forcibly displaced by a third person, although using the form of process of the state court, to which the assignee was not a party. The district court was open to the application of such third party if he desired to assert title and claim a delivery of the property by the assignee to him."

In the case of In re. Ulrich, 8 N. B. R., 15, H. B. Claflin & Co., and Steiner & Bro., attached the property of the bankrupt in proceedings in the courts of the state of Illinois. On petition those proceedings were enjoined.

In the case of In re. Stedman, 8 N. B. R., 319, immediately after Stedman was adjudged a bankrupt by the register, he appointed him agent to take charge of the property in his possession. While Stedman was holding the property, and before the appointment of an assignee, he was dispossessed of part thereof, to-wit: certain factories, etc., by a county sheriff acting under process of a state court. Ordered that within twenty days respondents deliver to the assignee the possession of the identical lands and tenements seized. Judge Erskine says, from the moment of the filing of the petition, the assets, by operation of law, are to be considered in custodia legis; and between the time of the filing of the petition and the appointment of the assignee it is the duty of the bankrupt to protect the estate and preserve it for creditors, and bring action if he has knowledge of impending danger through local process. The seizure was a contempt of court.

In in re. Brinkham, 7 N. B. R., 421, Fed. Cases, 1884, held that mortgagees should not be permitted to pursue the estate of the bankrupt in the state courts, but should come to the tribunal

which, under the federal laws, is charged with its administration. The opinion is very exhaustive, citing all the cases in bankruptcy; and though by referee, was approved when the matter came before Judge Blatchford.

In the case of Byrd vs. Harrold, 18 N. B. R., 434, mortgagees attempted to foreclose mortgages on property in the possession of the bankrupt. Held, that the mortgagees would be restrained. The sheriff was ordered to deliver the identical property to the assignee. The conduct of sheriff and mortgagees amounted to a contempt of court.

In re. Feeny, 4 N. B. R., 233, was a petition and order to show cause why a mortgagee should not be punished for contempt for violating an order of the court enjoining him from foreclosing a mortgage on stock in trade of the bankrupt after the decree of bankruptcy. The suit to foreclose was commenced in the state court. Held, that the respondent was guilty of contempt, although the injunctional order had not been served upon him personally. He was ordered to pay a fine equal to the amount of loss occasioned by his proceeding.

See also Markson vs. Heaney, 4 N. B. R., 518.

Price vs. Price, 48 Fed. Rep., 823.

In re. Atkinson, 7 N. B. R., 143.

In re. Miller, 6 Bissell, 33.

In re. Wallace, 2 N. B. R., 134.

In re. Bridgeman, 2 N. B. R., 252. Fed. Cases 1867.

That case held that the distribution of the assets of a bankrupt cannot be interfered with by process of a state court; and the assignee was not subject to garnishment in such court.

In re. Kerosene Oil Co., 2 N. B. R., 529. Action of a state court in appointing a receiver of property in the hands of an assignee in bankruptcy, held void. Affirmed, 3 N. B. R., 125, 6 Blatch, 521.

In re. Wynne, 4 N. B. R., 30. "No lien can be acquired or en-

forced by any proceedings in a state court commenced after petition is filed."

Main vs. Glen, 7 Bissell, 93.

In re. Mallory, 6 N. B. R., 22.

Davis vs. Anderson, 6 N. B. R., 145.

Phelps vs. Sellick, 8 N. B. R., 390.

Hyde vs. Bancroft, 8 N. B. R., 24.

Contempt proceedings for violating an order of bankrupt court enjoining further proceedings in state court.

In Hutchins vs. Iron Works, 8 N. B. R., 458, the mortgagee began foreclosure proceedings in state court after filing of petition and before appointment of assignees. Held that filing of petition withheld all power from the mortgagees to take possession of the bankrupt estate, without consent of the bankrupt court.

Walker vs. Seigel, 12 N. B. R., 394.

In re. Sabin, 18 N. B. R., 151. A district court has jurisdiction of a controversy as to the ownership of a fund in the hands or under the control of the assignee in bankruptcy, without regard to the citizenship of the parties in interest.

In Smith vs. Mason, 14 Wallace, 419, it appeared that Sawyer, Risher & Hall held a claim against the United States, which they put into the hands of Taylor for collection. On January 20th, 1867, the firm assigned it to Biddle & Co., by an order on Taylor to pay the proceeds to B. & Co., when collected. The order was accepted by Taylor. B. & Co. assigned the order in turn to Smith. Taylor collected about a thousand dollars, and Sawyer went into bankruptcy, Mason being appointed his assignee. The firm of Sawyer, Risher & Hall was dissolved. Taylor then collected $4,700.00. Mason as assignee filed a bill in the bankrupt court for an accounting against Risher & Hall; and on April 7th, 1869, filed a petition again Smith, alleging B. & Co. had been paid in full and asked for an order on him to show cause why the money should not be decreed to him, Mason, as assignee. Smith

appeared and set up his claim to the money. B. & Co. were not parties, and did not appear. The court made an examination of the accounts between S. R. & H. and B. & Co., decided that the original debt due B. & Co. was satisfied, and that the funds in the hands of Taylor should be paid over to Mason, the assignee. The circuit court on appeal decided that the money belonged to Risher & Hall, and ordered it paid over to them. Smith claimed to have absolute title to the money, and to be a bona fide purchaser for value. None of the money ever came into the possession of the bankrupt or his assignee, the bankrupt having parted with the legal title. This court on appeal held that the title thus claimed by Smith and Biddle and Co. could not be decided in a summary proceeding on an order to show cause, and that the following clause of the bankrupt act of 1867 gave the right to a proceeding either at law or in equity in which there should be parties, either in the district or the circuit court of the United States, to determine the title to the res.

"Said circuit courts shall also have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt, transferable to or vested in such assignee." The court say, the assignee in bankruptcy had neither the possession nor the right of possession to the money at the time the petition for the rule was filed.

In Marshal vs. Knox, 16 Wallace, 551, the facts were that Marshal owned a plantation, and leased it to Nathan Smith and Henry Fuller. The tenants being in arrears $1,400.00 Marshal, on January 4th, 1868, commenced an action in the district court of a parish in Louisiana, and obtained a writ of provisional seizure, which was served by the sheriff on January 6th, 1868, by serving a copy on the lessees, and by seizure of their property. Afterwards, on January 15th, 1868, the lessee Smith filed a petition in bankruptcy, and was declared a bankrupt on February 12th, 1868.

The assignee on a rule upon Marshal and the sheriff obtained an order to show cause why the property should not be delivered to the assignees. On a hearing the rule was made absolute. The bankrupt court refused to allow an appeal, and Marshal filed his bill in the circuit court for the district of Louisiana, to enjoin the assignee from proceeding. It was held by this court upon appeal that the circuit court should have entertained jurisdiction of the bill. That the marshal and the sheriff had a right to retain possession of the property, having got possession thereof previous to any bankruptcy proceedings, and having a valid lien thereon; and such possession being lawful and adverse, and obtained before the bankruptcy proceedings, the court should not have ordered the same turned over to bankrupt's assignee on an order to show cause.

The case of Eyster vs. Gaff, 91 U. S., 521, involved the title to real estate. A mortgage was given by McClure and in 1868 the mortgagee commenced foreclosure proceedings. Under a decree in 1870 the plaintiffs became purchasers. Before the decree, but long after the proceedings were commenced for foreclosure, McClure became a bankrupt. The defendant in the ejectment suit was tenant under McClure. The contention was that no title passed to the purchasers under the decree of foreclosure. The bankrupt court never took any steps to stay the proceedings in foreclosure, and never concerned itself therewith. This court held that under such circumstances the purchaser at the foreclosure sale obtained a good title. In the opinion in this case will be found the language upon which the petitioners base their contention that the order made by Judge Seaman was coram non judice. The language evidently applies to such a state of facts as that pre sented by Mason vs. Smith and Marshal vs. Knox. If, by stretching the meaning of that language to the utmost, it can be said to apply to such a state of facts as is presented in the case at bar, we suggest, with great respect for the opinions of the learned Judge who delivered that opinion, that the language is subject to the criticism of Chief Justice Marshal in the case of Cohens vs. Virginia, 6 Wheat., 399.

The case of Burbank vs. Bigelow, 92 U. S., 179, arose in the circuit court of the United States for the district of Louisiana, and was brought under Section 2 of the original bankrupt act of 1867. Section 4979 of the Revised Statutes. The bankrupt Bigelow in his schedule disclaimed all interest in the res, which was a judgment, and the proceeds of the judgment never came into the hands of the bankrupt or the assignee. The first court to get possession of the res was the court of original jurisdiction in the case of Burbank vs. Bigelow. The Court will notice that the section we have quoted in Smith vs. Mason has undergone a change, and appears as Section 4979 R. S. The case was decided on the authority of Lathrop vs. Drake, 91 U. S., 516.

Petitioners rely on the case of Donaldson vs. Farwell, 93 U. S., 631. The case merely held that where the assignee in bankruptcy brought suit for taking goods which, at some time before the adjudication in bankruptcy, had been in possession of the bankrupt, the defendants could set up the defense that the bankrupt had purchased the goods of defendants under false pretenses; and that the assignee in bankruptcy was not a bona fide purchaser for value. As said by Judge Seaman in his opinion the action was brought under Sec. 4979 R. S. The question here presented could not arise and was not discussed in that case.

Claflin vs. Houseman, 93 U. S., 130. held that the assignee might sue in state courts to recover the assets of the bankrupt.

In Yeatman vs. the Savings Institution, 95 U. S., 764, F. and H. on July 22nd, 1871, pledged with the New Orleans Savings Institution two certificates of indebtedness issued by the state of Louisiana, to secure their promissory note to said institution. No question of the legality of the pledge was raised. November 27th, 1871, F. and H. were adjudged bankrupts, and the assignee demanded the certificates of indebtedness from the Savings Institution; and upon their refusal, brought suit in the circuit court of the United States for the district of Louisiana for the value of the certificates. Held that he could not recover. There was nothing in the bankrupt law avoiding such a pledge. Court say, if

the assignee regarded the certificates as of greater value than the debt for which they had been pledged, or if the interest of the creditors required prompt action, he had authority under the statute and the orders of the court to tender performance of the contract of pledge, or to discharge the debt for which the certificates were held. He had the right, perhaps, under orders of the court to sell them, subject to the claim of the defendant in error.

IV

DECISIONS UNDER THE PRESENT BANKRUPT ACT.

In Blake et al. vs. Francis Valentine Co., 89 Fed. R., 691, it is said, in proceedings relating to voluntary bankruptcy the filing of the petition is of itself an act of bankruptcy, and the debtor thus surrenders all his estate and effects for the benefit of his creditors, and is at once, without a hearing, adjudged a bankrupt. The district court is thereby clothed in such a case, upon the filing of the petition, with jurisdiction over the debtor and his property. The court is authorized to take such steps as may be necessary to protect creditors.

In In re. Brooks, 91 Fed. R., 508, the court say, "The assets of the bankrupt are brought by the proceedings within the reach and control, and subject to the orders of the court, and no one has any right to remove or meddle with them but for their preservation without leave of the court, except the trustee. Anyone so doing will be subject to the penalty provided for in Section 29b." See also,

In re. Smith, 92 Fed. R., 135.

Ethridge Furniture Co., 92 Fed. R., 329.

In re. Brown, 91 Fed. R., 358.

In re. Francis Valentine Co., 93 Fed. R., 953.

In re. Richard, 94 Fed. R., 633.

Norcross vs. Nathan, 99 Fed. R., 417.

In re. Cobb, 96 Fed. Rep., 821.

"The assertion of any right against, or to participate in the res so in custodia legis must be sought in the court in whose custody it is. Any attempt to assert such right elsewhere would be regarded as a contempt."

So held in Carter vs. Hobbs, 92 Fed. R., 594.

See also Southern Loan & Trust Co. vs. Benhow, 96 Fed. R., 514.

In the case of In re. Brooks, 91 Fed. R., 508, it appeared that at the time of the adjudication the petitionee held a chattel mortgage, of which the conditions were broken, on the goods of the bankrupt, and that the constable had taken the property under the chattel mortgage and locked it up in a room on the bankrupt's premises, and taken the key. After notice of bankruptcy proceedings, the constable sold the mortgaged property to the petitionee. It was held that the court of bankruptcy had jurisdiction of the petition by the trustee for an order directing a restoration to said trustee of the property of the bankrupt, so held under the chattel mortgage.

Another case is that of In re. Gutwilling, 90 Fed. R., 481. Replevin suit in a state court. That case is different from the one at bar, however, in that the suit was brought in the state court before the adjudication of bankruptcy.

In Keegan vs. King, 96 Fed. R., 758, the trustee came into possession of certain personal property. The defendants claimed title thereto and brought suit in a superior court of the state of Indiana to restrain the trustee from selling said property, and to establish the title in the defendants. This action was restrained by an order issued by Judge Baker from the district court. The res was in the custody of the bankrupt court, and could not be interfered with by action in the state court. The case is directly in point.

Another case is that of In re. Agins. This case arose in the second circuit before Judge Addison Brown, district judge for the southern district of New York. We have been unable to find

ny report of the case, but the facts were that Jacob Agins filed is petition in bankruptcy December 19th, 1898, before which ime H. B. Claflin Co. commenced an action of replevin in the city ourt of the city of New York. On petition Judge Brown en- ered an order restraining the H. B. Claflin Co. and sheriff of New York, and their attorneys, from proceeding in the replevin uit. The court refused to vacate the order, and the question vas brought before the circuit court of appeals for the second judi ial circuit, where the order of Justice Brown was unanimously ffirmed. See in re. Agins, 92 Fed. R., 1018, 34 C. C. A., 682.

The report as it there appears is as follows: "Before Wallace, Lacombe and Shipman, Circuit Judges. No opinion. Order of Circuit Court affirmed."

We have gleaned the facts in the case from volume 1, No. 8 of he National Bankruptcy News, page 180, and volume 1, No. 6 National Bankruptcy News, page 133.

Another case directly in point is that of In re. Endl, 99 Fed. R., 915. A trustee in bankruptcy had peaceably acquired posses- ion of personal property, claiming it as assets of the estate. A constable acting under process issued by a justice of the peace, seized the property. On summary proceedings he was ordered to return the goods to the trustee. Opinion by Wellborn, District Judge.

We call especial attention to In re. Chambers Co., 98 Fed. Rep., 865, also directly in point.

Counsel's argument seems to be founded on two propositions:

First. That by Section 23b of the bankrupt law the state courts have exclusive jurisdiction of all actions or proceedings, unless there is diverse citizenship and more than two thousand dollars involved; or unless the claimant consents to have the mat- ter tried by the bankrupt court.

Second. That the bankrupt law does not give the bankrupt court any jurisdiction to determine title to property in its custody and under its control, and therefore the district court for the east

ern district of Wisconsin was without jurisdiction to make the order that the goods should be turned back into the custody of that court, because, after they were turned back and the court again got possession of the goods, that court would not have jurisdiction of any proceeding that might thereafter be instituted for the purpose of determining the title thereto.

AS TO SECTION 23B.

We fail to see how it can become necessary in this case for this Court to construe Section 23 of the bankrupt law. It will be noticed in the first place that Subdivision b of that section begins as follows: "SUITS BY THE TRUSTEE," etc. This is not a suit by a trustee. It is a summary proceeding in equity for the court's own protection. It is a proceeding under Subdivisions 13 and 15, of Section 2 of the bankrupt act. The only suit that has been brought is the replevin suit in the state court, inaugurated by petitioners.

As to their contention that the bankrupt court has not power to determine the title to res in its custody, we refer merely to Section 2 of the bankrupt law, expressly giving such power. We further call attention to the fact that the bankrupt court has, by express enactment of congress for the first time in bankruptcy legislation, been created a court of equity as well as law, as has been recognized by your Honors in Rule 37, relating to bankruptcy proceedings. Every court of chancery, as we have already shown, has inherent power and jurisdiction to determine title to res in its custody.

Section 23 of the bankrupt law has been construed by the judges of the circuit court of appeals in several districts, and in numerous decisions by district judges. In the overwhelming majority of cases this Section 23 has been construed as a limitation upon the jurisdiction of the United States Circuit Court. In one or two decisions it has been construed as a general limitation on United States Courts and in some decisions an intermediate position has been taken. The various constructions have been elabor-

ately argued by hte federal judges. As we do not think this case involves the construction of that section of the bankrupt law, and as we are of the opinion that if it does involve such construction the questions have been much more ably argued by the federal courts than they can be by us, we shall simply refer the court to some of the principalc ases. One of the most thorough opinions is that delivered by Judge Lowell of the first district in the case of In re. Hammond, 98 Fed. R., 845. The various constructions are examined at great length. The great weight of authority is in favor of the jurisdiction of the district courts, as is shown by this opinion.

We also refer the Court to In re. Sievers, 91 Fed. R., 366. Affirmed in Davis vs. Bohle, 92 Fed. R., 325.

Carter vs. Hobbs, 92 Fed. R., 594.

In re. Gutwillig, 92 Fed. R., 337.

In re. Newberry, 97 Fed. R., 24.

Leidigh Co. vs. Stengel, 95 F. R., 637.

Pepperdine vs. Headley, 98 Fed. Rep., 863.

Shutts vs. Bank, 98 Fed. Rep., 705.

Louisville Trust Co. vs. Marx, 98 Fed. Rep., 456.

Murray vs. Beal, 97 Fed. R., 567.

Cox vs. Wall, 99 Fed. R., 546.

Lehman vs. Crosby, 99 Fed. R., 543. This case suggests that the section applies to suits for the collection of debts.

Norcross vs. Nathan, 99 Fed. Rep., 414.

We also beg to call your Honor's attention to the case of In re. Woodbury, 98 Fed. R., 833, where Judge Amidon has construed this section and attempted quite successfully to reconcile the different provisions of the act.

See also an able opinion by Referee Olmstead in the matter of Murphy, volume 2, No. 8, page 393, et seq., National Bankruptcy News and Reports.

The case of In re. Kelley, 91 Fed. R., 504, seems to be correctly decided. There no adjudication in bankruptcy had taken place. The petition, instead of being for an injunction, was for the seizure of the property under Section 69, and it did not appear that the person proceeded against was insolvent.

The case of Mitchell vs. McClure, 91 Fed. R., 621, simply held that a plenary common law action of replevin cannot be instituted by a receiver in a district court. It decided nothing else. The court says, "What the jurisdiction of the district court, sitting as a court of bankruptcy, may be in other forms of procedure, or what its powers to reclaim or otherwise take possession of the bankrupt's property, are questions not now before us." In that case the res was never within the jurisdiction of the court.

In case of In re. Brodbine, 93 Fed. R., 643, the res had never stood in the name of the bankrupt, and never came into the possession of the court or its officers.

In the case of Heath vs. Schaffer, 93 Fed. R., 647, possession was taken under a chattel mortgage several months before bankruptcy. Court says, that if the proceedings had been brought for the purpose of taking property away from the trustee, or for interfering with the control of the property in custodia legis, a different question would be presented.

In the Abrahams case, 93 Fed. R., 772, the assignee in voluntary assignment took possession before any proceedings in bankruptcy were instituted, and sold the goods to B., who purchased them for a full consideration. The case would be parallel to the one at bar if the assignee in voluntary assignment had been appointed after bankruptcy, and then had attempted to take goods from the trustee.

This is an equitable proceeding in bankruptcy; one distinctly arising out of the fact of bankruptcy. It is derived through no assignment, legal or equitable, by instrument or deed from the bankrupt. If bankruptcy had not occurred, this summary procedure to have certain property returned to the custody of this

Court could not have been brought by the bankrupt in any court. If Cogan & Co. had seized these goods out of the possession of the bankrupts, and no bankruptcy had ever taken place, the bankrupts might have been defendants in an action to determine the title. Or, if the goods had been taken by Cogan & Co. without process, the bankrupts might have brought a suit to determine title. But this is not a suit to determine title. It is therefore distinctly such a proceeding as could never have been brought or instituted by the bankrupts if no bankruptcy had occurred. It is therefore not within Section 23 under any circumstances.

In re. Brooks, 91 Fed. R., 508.

Murray vs. Beal, 97 Fed. R., 567.

The same Judge who decided In re. Endl, 99 Fed. R., 915, had, previous to that decision, decided in the case of Perkins vs. McCauley, 98 Fed. R., 286, that the district court did not have jurisdiction under Section 23 of a bill to set aside a conveyance on account of fraud, following those few decisions limiting the jurisdiction of United States Court. And yet, when the question involved in this case came before that Judge, he without hesitation, on petition and order to show cause, ordered the constable to restore the goods seized to the custody of the bankrupt court.

V.

FURTHER ASPECTS OF THE QUESTION.

The first question should be aswered in the affirmative. The court had jurisdiction by summary proceedings to compel the return of the property seized.

THIS PROCEEDING HAS ABSOLUTELY NOTHING TO DO WITH THE LAWFUL TITLE TO THE PROPERTY SEIZED. THE LEGAL TITLE DID NOT COME INTO CONTROVERSY, AND NO DETERMINATION IN RESPECT THERETO WAS MADE.

It will be noticed that the order is very carefully drawn. That in the first place it merely restrained the disposition of the prop-

erty, and in the second place, directed those having possession thereof to turn over and deliver the same to the trustee within twenty days. And further, the order carefully provides that the trustee shall keep the property when delivered to him, apart and separate from the other property, to abide the further order of the court; and if the court should afterwards order a sale thereof, the proceeds of the sale should be kept separate. This last provision made it possible for the trustee to sell the property under order of the court, upon stipulation of all parties in interest, as was actually done. The greatest care was taken in drawing the order not to affect any rights which Cogan & Co. might have to the property or proceeds thereof. Absolutely nothing was determined in this proceeding as to the legal title thereto.

The law is very clear that such an order may be made upon a rule to show cause. See the opinion of Chief Justice Marshal in the case of Slocum vs. Mayberry already quoted, and the many cases which we have cited in this brief.

A trustee under the bankrupt law occupies a stronger position than does a receiver under the chancery practice of the federal courts. He is something more than a receiver, as Chief Justice Shaw said in the Nahant Bank case. The practice, however, in chancery in the case of receivers has settled that just such an order as that entered in this case may be made in a summary proceeding. "It is unnecessary to file a bill in chancery under such circumstances, but a receiver may apply by a montion or petition in the receivership suit for an injunction against the prosecution of actions against the property that can only be brought by leave of the court appointing him, or against other acts of interference with his possession."

Volume 17 Ency. of Pleading and Practice, page 774, and cases there cited. So held by this Court in an opinion by his Honor Mr. Chief Justice Fuller in the case of In re. Tyler, 149 U. S., 164.

Ex parte Chamberlain, 55 Fe l. R., 704, where an order quite

similar to that entered by Judge Seaman was made by Judges Goff and Simonton. In that case state officers attempted to levy on property in the hands of the receiver, to satisfy taxes. See also Virginia Steel & Iron Co. vs. Land Co., 88 Fed R., 134.

There is no doubt of the right of a court of chancery to summarily punish for contempt any violation of an injunction against interference with property within its custody. American Co. vs. Jacksonville R'y. Co., 52 Fed. R., 937.

Suppose this property had been in the court room, where the court was in session, and the sheriff under a writ of replevin from a state court had attempted to seize the property. Could it be contended that the court could not summarily retake the property, through its marshal, and even punish the sheriff for contempt? Yet counsel would claim that Sec. 23b divests the court of this right.

The line could be more clearly drawn by supposing another case, to-wiv: that Cogan & Co., instead of being residents of the state of Massachusetts, had resided in the eastern district of the state of Wisconsin, and had for a long time previous to the adjudication had these goods in their possession, claiming legal title thereto. In such a case it is possible that the court could not, on summary process, order Cogan & Co. to turn the goods over to the trustee. Certainly they could not, in such proceeding, determine the title. In such case the trustee might have filed a bill in equity in the bankrupt court to have Cogan & Co.'s title declared void, and to have the goods turned over to the trustee. Under such circumstances it would be necessary to construe Section 23 of the bankrupt act.

If Cogan & Co. had seized these goods under an attachment within four months preceding the date of the adjudication, that also would present another question, and one not now before the court.

The remedy of petitioners, or rather Cogan & Co., is clear. They should institute some proceeding in the bankruptcy court

to determine the title to the goods; or, under the present circumstances, as the goods have been sold under stipulation, to determine the title to the proceeds. In chancery the remedy is a bill pro interesse suo. In bankruptcy, however, they would perhaps be entitled to have an issue made up and have the matter tried by a jury, express provision for a jury being made by Section 19 of the bankruptcy act.

It cannot avail petitioners to assert here that state courts have concurrent jurisdiction with bankruptcy courts in certain proceedings. If the state court and the bankruptcy court have concurrent jurisdiction to determine the title to res, the res having come into the possession of the bankrupt court and under its control, and in its custody, that court has exclusive jurisdiction. Where two courts have concurrent jurisdiction, the court first securing jurisdiction over the res will retain that jurisdiction for all purposes. It has therefore become necessary for Counsel to urge that the state courts have exclusive jurisdiction of proceedings in bankruptcy. Such a construction would annihilate the bankrupt law and is impposible. The court may dissolve liens and attachments, and fraudulent preferences (Section 67); but Counsel denies it the power to protect its own jurisdiction.

Counsel has argued in the course of this proceeding that no appeal is provided from a decision respecting such title, and hence the district court has no power to decide respecting the title.

Certainly Counsel has the remedy which he has taken advantage of in this case, and he probably has others. If not, it is immaterial. As being directly in point on that argument we refer to what Mr. Justice Story says in 3 Howard, on page 317, in the case of In re. Christy.

It is respectfully submitted that the first question certified to this Court should be answered in the affirmative; and the second question should be answered in the negative.

CHARLES BARBER,
Counsel for Respondents.

CARL D. JACKSON,
Of Counsel.